

CIVIL DIVISION

The lawyers in the Civil Division represent the United States in all civil litigation arising in Arizona U.S. District Court and Arizona State Courts in which the United States and its interests, agencies and employees, are involved. The Civil Division is staffed by fourteen Assistant United States Attorneys (AUSAs) in Phoenix and six in Tucson. Five AUSAs work in the Affirmative Civil Enforcement Section where the United States is a plaintiff prosecuting cases on its behalf to secure monetary, injunctive or other affirmative relief. The remaining fifteen AUSAs are assigned to the Defensive Section defending actions brought against the United States, its agencies or its employees.

Most civil litigation involving Indian Country arises under the Federal Tort Claims Act ("FTCA"), principally due to the Congressional extension of FTCA coverage to tribes, tribal organizations and/or tribal employees under the Indian Self-Determination Act ("ISDA") and the Tribally Controlled Schools Act of 1988. Certain tort claims, resulting from the performance of former BIA and IHS functions such as law enforcement, inmate detention or the provision of health services by an Indian tribe, tribal agencies and their employees, operating under a contract or compact, grant agreement, or any other agreement with the BIA or the IHS, must be filed as an action against the United States under the FTCA. Similarly, common law torts arising from education services provided by former BIA funded schools which elect to become a grant school pursuant to a contract with the BIA must be filed as an action against the United States under the FTCA. The following are typical cases that the Civil Division routinely handle:

UNITED STATES v. JOHN B. KNIGHT, ET AL.

A complaint to recover civil penalties pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. 6901 et. seq., was filed on behalf of EPA against owners and operators of a Tuba City gas station on the Navajo Reservation for underground storage tank violations. The complaint names as defendants John B. Knight Jr., Robert D. Brown, National Petroleum Marketing Inc., Sunwest Express Inc., and Navajo Trails, Inc. as owners and operators of the SuperFuels gas station now operated by Tuba City Express. The complaint alleges that the defendants failed to adequately test for corrosion of underground storage tanks, failed to perform appropriate leak detection of underground storage tanks, failed to report and investigate suspected releases from underground storage tanks, failed to provide information when requested and failed to maintain financial assurances for potential cleanup costs and damages. The violations were discovered during an inspection in 1999. Compliance with underground storage tank requirements in Indian Country is critical because small releases of petroleum products can foul large amounts of underground water resources.

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UNITED STATES v. COREGIS INSURANCE & ST. PAUL INSURANCE

These cases involve insurance disputes concerning two tribal school districts that were insured by Coregis Insurance and a tribe that was insured by St. Paul Insurance. School district and tribal employees caused three separate accidents. Although the districts and the tribe had liability coverage under the Federal Tort Claims Act ("FTCA") as section 638 contractors, they purchased liability insurance from Coregis and St. Paul. The policies contained no exclusions for claims otherwise covered by the FTCA and the districts' and tribe's premiums were not reduced due to potential FTCA coverage. The insurers refused to defend or indemnify the accidents, despite demand by the United States, claiming the FTCA provided primary and exclusive coverage. As a result, the United States was forced to defend the school districts and the tribe under the FTCA, and ultimately settled the three underlying cases for a total of \$479,500. The office sought reimbursement of this amount from Coregis and St. Paul by claiming they breached their contractual duties to defend and indemnify the school districts and the tribe. The insurers reimbursed the United States the \$479,500, plus a small amount for interest and costs. These cases hopefully will set a precedent requiring insurers to honor the terms of their policies issued to tribal entities.

GAYMAN v. COLORADO RIVER INDIAN TRIBE ET AL.

The plaintiff is a non-Indian who claimed that he was falsely arrested and assaulted by employees of the Blue Water Resort and Casino. The plaintiff sued the Colorado River Indian Tribe because the Blue Water Resort and Casino are a wholly owned and operated enterprise of the Tribe. Because the defendant employees include an off-duty Colorado River Indian Tribe Police Department officer, the plaintiff also sued the Chief of Police for negligent training and supervision of the off-duty officer. Since the CRIT Police Department operates under an Indian self-determination contract with the Bureau of Indian Affairs (BIA) and the Chief of Police was acting within the contract, the United States was substituted for the Chief of Police as the defendant. The two primary issues before the district court were (1) the scope of a waiver of Tribal sovereign immunity in the State-Tribal Gaming Compact and (2) the scope of Federal Tort Claim Act (FTCA) coverage of the self-determination contract (commonly known as § 638 contracts). These issues were resolved in favor of the defendants.

ADLEY v. VICTOR ET AL.

The plaintiffs, the mother and daughter of the deceased, sued the United States and the San Carlos Police officer, for the negligent use of deadly force and the officer individually for violations of the constitutional rights of the deceased. Since the tribal police officer was acting within the scope of the § 638 contract with the Bureau of Indian Affairs, the United States was substituted for the police officer as to the cause of action alleging negligence. In the constitutional tort action, the Tribal officer is represented by counsel hired

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by Tribal insurance. The defendant officer moved to dismiss the constitutional tort action because (1) the plaintiffs have failed to exhaust their Tribal court remedies, (2) there is no federal constitutional tort action since the Tribal officer was enforcing Tribal law against a Tribal member on Tribal land and finally (3) only the Indian Civil Rights Act provides a remedy for violations of constitutional rights of Native-Americans on reservations and only the Tribal court has jurisdiction over Indian Civil Rights Act suits. Suit against the officer was dismissed. The United States has filed a motion for summary judgment on the grounds that the officer was justified in the use of deadly force under the circumstances of this case.

ELENA WHITE ET AL. v. UNITED STATES

On the afternoon of October 18, 2002 the Rock Point Community School Student Council and various other sponsors held their Homecoming Parade. Students from the junior and senior high school grade levels (7th through 12th) and other student organizations entered their floats in the parade. With a few exceptions, the floats were constructed on private vehicles. After the parade was over and the vehicles parked in the parking lot, a student suddenly accelerated one of the floats and a girl who was now sitting on the cab of the truck fell off and sustained closed head trauma and other more minor injuries. The case is pending and the liability of the school district is uncertain at best due to the sudden and unforeseeable conduct of the student who drove the vehicle.

WIDE RUINS COMMUNITY SCHOOL v. STAGO

The United States filed an *amicus* brief in the Navajo Nation Supreme Court explaining that the Court's prior ruling, while favorable in part to a position of the United States, had been overly broad. Stago had filed a claim under the Navajo Preference Employment Act with the Navajo Nation Labor Commission against Wide Ruins Community School. The Commission ruled in her favor. The Navajo Nation Supreme Court originally held that Section 314 of the Indian Self Determination Act or the Tribally Controlled Schools Act of 1988 converted this personnel action against a tribally-owned school into a claim against the United States. Our *amicus* brief argued that Section 314 applied only to claims actionable under the Federal Tort Claims Act, and did not apply to labor claims such as this. The Navajo Nation Supreme Court agreed and revised its decision consistent with our position that the Act applied only to tort claims, not personnel actions. In two consolidated actions in United States District Court, Wide Ruins Community School brought actions trying to avoid the Navajo Nation Supreme Court's ruling in an effort to render the United States rather than the School liable in personnel actions. The District Court agreed with the Navajo Nation Supreme Court and with our position, and held on July 15, 2003, that the Act did not subject the United States to liability for personnel actions, and that personnel actions would continue to be subject to adjudication in the Navajo Nation courts.

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HAZELWOOD v. UNITED STATES

This is a Federal Tort Claims Act (FTCA) case in which the plaintiff is seeking damages in the amount of \$1,000,000 for the wrongful death of an 11 year old girl who lost control of her bicycle on a paved road on the Yavapai-Apache Indian Reservation and ultimately fell into a ravine where she hit her head on a rock and died. The roads in this area are under a maintenance contract with the Yavapai Apache tribe under a 638 Agreement. The Plaintiff alleges improper design, failure to warn, and failure to supervise and properly maintain the road. The case is in the discovery phase.

HOBB-CHEE v. UNITED STATES

This is a Federal Tort Claims Act (FTCA) medical malpractice case in which the plaintiff alleges that the Fort Defiance Hospital and its health care providers did not meet the standard of care in the labor and delivery of a child who was delivered by emergency cesarian section after a high risk pregnancy. The child's birth was further complicated by blood clots in her trachea which necessitated several resuscitation attempts. As a result of one or more medical events, the child suffered permanent severe brain damage including birth asphyxia, hypoxic ischemic encephalopathy, seizure disorder, spastic quadriplegia, blindness, and profound hearing loss. This case is presently in the discovery phase.

KURT SNYDER v. THE NAVAJO NATION ET AL.

Employees of the Navajo Nation Department of Safety sued the Nation and the United States for overtime pay, claiming coverage by the Fair Labor Standards Act. The Court dismissed the entire action because the Nation could not be sued due to sovereign immunity and was an indispensable party to any such action. Defense of the United States in district court was handled by Jim Hair. Plaintiffs appealed and defense of the appeal was handled by the Appellate Staff of the Civil Division, Department of Justice. In a decision issued June 10, 2004, the Ninth Circuit affirmed the district court dismissal of the entire action. Different but similarly situated plaintiffs, represented by the same attorney, have brought an identical action in district court, *Henderson v. The Navajo Nation, et al.* A motion to dismiss the United States has been filed in the district court and the court notified the Ninth Circuit's decision in Snyder. Dismissal of this second action is expected.

ELOUISE WILLIAMS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF COURTNEY BEGAY v. UNITED STATES, NATIONWIDE NURSING

In this case, the Plaintiff is seeking damages of \$10,000,000 in the wrongful death of a 12 year old Navajo girl who was treated by the Indian Health Service at the Kayenta Health Clinic. She subsequently died after transport to a Phoenix hospital. The complaint

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alleges that the clinic mistakenly administered epinephrine and metoprolol, which proximately caused cardiorespiratory failure due to inappropriate drug administration. The epinephrine was inadvertently administered by an independent contractor nurse. There is a factual dispute between the defendants as to whether a federal doctor ordered the metoprolol. Causation issues have been complicated by the pharmacological effects of the interaction between the two drugs and the patient's underlying condition. Fact discovery has been completed and all experts disclosed.